(4)

No. 02-321

IN THE

Supreme Court of the United States

MACHIPONGO LAND AND COAL CO., INC., VICTOR E. ERICKSON TRUST AND JOSEPH NAUGHTON,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, THE ENVIRONMENTAL QUALITY BOARD AND ARTHUR A. DAVIS, Secretary of Environmental Resources,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are the Pennsylvania Supreme Court's decisions on the questions set forth in the Petition for a Writ of Certiorari final under 42 U.S.C. § 1257 even though there are further proceedings anticipated in state court?

2. Is the parcel as a whole rule applicable to preclude vertical segmentation and application of the *Lucas* categorical test to the segmented coal rights where a regulation affects certain coal rights, held as part of a fee simple title, and the other property rights have other economically viable uses?

3. Is the parcel as a whole rule applicable to preclude horizontal segmentation and application of the *Lucas* categorical test to the segmented property where a regulation only affects a small portion of a property owner's larger contiguous parcel?

4. Is the Commonwealth entitled to present evidence at trial to establish that the restrictions imposed by a regulation duplicates the results that would have been achieved under background principles of nuisance and property law?

5. Are the concurrent factual findings of the Trial Court and the Pennsylvania Supreme Court on the issues of the thickness of a particular coal seam and the economic mineability of a particular mine site subject to a rigorous review by this Court absent exceptional circumstances?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	1
STATEMENT OF THE CASE	1
Statement of Procedural History and Prior Determinations	3
UFM Regulation in Question	4
Petitioners' Property	6
Uses of Property	7
ARGUMENT	7
I. THE SUPREME COURT LACKS JURISDICTION TO DECIDE THIS CASE UNDER SECTION 1257	7
A. The Pennsylvania Supreme Court's Decision Is Not a Final Judgment Or Decree Within The Meaning of Section 1257	7
B. This Case Does Not Fit Within The Limited Set Of Situations Identified In *Cox Broadcasting*	8
C. A State Judgment In A Regulatory Takings Case Is Not Final Under Section 1257 Unless It Addresses Both The Takings And The Payment Of Just Compensation	10
II. PENNSYLVANIA SUPREME COURT HAS PROPERLY REJECTED THE EXPANSION OF THE SCOPE OF THE *LUCAS* CATEGORICAL TAKINGS ANALYSIS	11

TABLE OF CONTENTS—Continued

Page

A. Pennsylvania Supreme Court's Decision Is Consistent With This Court's Decisions On The Parcel As A Whole Rule From The Horizontal Perspective 11

1. Parcel As A Whole Rule Remains The Appropriate Rule To Follow In This Case 11

2. The Basis For Discomfort With The Parcel As A Whole Rule Is Not Present Under The Facts Of This Case 14

B. The Pennsylvania Supreme Court Properly Decided The Vertical Segmentation Issue ... 15

1. Pennsylvania Supreme Court's Decision Is Consistent With *Keystone* and Later Decisions 17

2. The Pennsylvania Supreme Court Declined To Grant The Coal Estate Special Status Under Pennsylvania Property Law In A Regulatory Takings Case 19

III. PENNSYLVANIA SUPREME COURT CORRECTLY ADDRESSED THE BACKGROUND PRINCIPLES OF NUISANCE LAW 20

A. Trial Court Denied Commonwealth's Repeated Requests To Introduce Any Evidence On The Background Principles Of Nuisance Issue 21

TABLE OF CONTENTS—Continued

Page

B. Pennsylvania Supreme Court Remanded The Case To Give The Commonwealth The Opportunity To Introduce Evidence On The Background Principles Of Nuisance Law 22

C. Property Owners Want This Court To Prejudge The Background Principles Of Nuisance Law Issue Before Trial 23

D. The Background Principles Of Nuisance Law Issue Does Not Fit Within Any *Cox Broadcasting* Category 24

IV. TRIAL COURT'S FACTUAL FINDINGS ARE NOT A FEDERAL ISSUE THAT FITS WITHIN ANY *COX BROADCASTING* CATEGORY 25

V. PROPERTY OWNERS' TAKINGS CLAIMS ARE NOT RIPE UNDER FEDERAL RIPENESS PRINCIPLES 27

A. A Preenforcement Challenge To A Regulation Is Not Ripe As An "As Applied" Challenge And Federal Ripeness Principles Bar Such A Claim 27

B. The Commonwealth Has Never Had An Opportunity To Explain The Reach Of Its Regulation 29

CONCLUSION 30

APPENDICES 1a

TABLE OF AUTHORITIES

CASES — Page

Andrus v. Allard, 444 U.S. 51, 100 S.Ct. 318 (1979) ..... *passim*
Arsenal Coal Company v. Dept. of Envir. Res., 505 Pa. 198, 477 A.2d 1333 (1984) 27
Bower v. Bower, 531 Pa. 54, 611 A.2d 181, (1992) 28
Cal Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S.Ct. 937 (1980) 27
Commonwealth v. Barnes & Tucker, Co., 455 Pa. 392, 319 A.2d. 871 (1974) 22
Concrete Pipe and Products of Calif., Inc. v. Construction Laborers Pension Trust for Southern Calif., 508 U.S. 602, 113 S.Ct. 2264 (1993) 12, 14, 15, 18
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029 (1975) ..... *passim*
Hernandez v. New York, 500 U.S. 352, 111 S.Ct. 1859 (1991) 27
Hunt v. Cromartie, 532 U.S. 234, 121 S.Ct. 1452, *rehearing denied*, 532 U.S. 1076, 121 S.Ct. 2239 (2001) 26
Jefferson v. City of Tarrant, 522 U.S. 75, 118 S.Ct. 481 (1997) 7
Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470, 107 S.Ct. 1232 (1987) ..... *passim*
Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886 (1992) ..... *passim*
Machipongo Land and Coal Co., Inc. v. Commonwealth, 155 Pa. Cmwlth. 72, 624 A.2d 742 (Pa. Cmwlth. 1993) (*Machipongo I*) .. 1, 28
Machipongo Land and Coal Co., Inc. v. Commonwealth, 538 Pa. 361, 648 A.2d 767 (1994) (*Machipongo II*) 1

TABLE OF AUTHORITIES—Continued

Page

Machipongo Land and Coal Co., Inc. v. Commonwealth, 544 Pa. 271, 676 A.2d 199 (1996) (*Machipongo III*) 2, 28

Machipongo Land and Coal Co., Inc. v. Commonwealth, 719 A.2d 19 (Pa. Cmwlth. 1998) (*Machipongo IV*) 2, 20

Machipongo Land and Coal Co., Inc. v. Commonwealth, No. 428 M.D. (Slip Opinion of October 28, 1999) (*Machipongo V*) 2

Machipongo Land and Coal Co., Inc. v. Commonwealth, No. 428 M.D. (Adjudication and Decree Nisi and Order dated August 21, 2000) (*Machipongo VI*) 2, 8, 21, 23

Machipongo Land and Coal Co., Inc. v. Commonwealth, 799 A.2d 751 (2002) (*Machipongo VII*) ..... *passim*

Market Street R. Co. v. Railroad Comm'n of Cal., 324 U.S. 548, 65 S.Ct. 770 (1945) 7

Miller & Sons Paving Inc. v. Plumstead Twp., 552 Pa. 652, 717 A.2d 483 (1998) 16

Palazzolo v. Rhode Island, 533 U.S. 606, 121 S.Ct. 2448, (2001) ..... *passim*

Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 98 S.Ct. 2646 (1978) ..... *passim*

Pennsylvania R.R. Co. v. Sagamore Coal Co., 281 Pa. 233, 126 A. 386 (1924) 22

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 65 S.Ct. 1475, (1945) 7, 8

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. ___, 122 S.Ct. 1465, (2002) ..... *passim*

324 Liquor Corp. v. Duffy, 479 U.S. 335, 107 S.Ct. 720 (1987) 26

TABLE OF AUTHORITIES—Continued

Page

Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S.Ct. 3108 (1985) 28, 29

STATUTES

Act of June 26, 1995 (P.L. 70, No. 194) 1
35 P.S. § 691.315(h)-(o) 3
52 P.S. § 1396.4e(a), (b)(1)-(2) 3
35 P.S. § 691.315(m) 4
52 P.S. § 1396.4e(f) 4

REGULATIONS

25 Pa. Code § 86.130(b)(14) 1, 23
25 Pa. Code §§ 86.101-86.129 3
25 Pa. Code § 86.123(d) 4
25 Pa. Code §§ 93.1 *et seq.* 23
22 Pa. B. 2715 (May 23, 1992) 24

FEDERAL STATUTES

Act of 1789, § 25, 1 Stat. 85 7
28 U.S.C. § 1257 ..... 7, 9

TREATSIES

Vol. 22 Moore's, Federal Practice, § 406.03[3][d][I] (Matthew Bender 3d. ed. 2002). 9

STATEMENT OF THE CASE

Statement of Procedural History and Prior Determinations

On July 1, 1992, The Machipongo Land and Coal Co., Inc. (Machipongo), the Victor E. Erickson Trust (Erickson) and Joseph Naughton (Naughton), (collectively Property Owners) filed a Complaint (known as a Petition for Review) in the Pennsylvania Commonwealth Court (Trial Court) against the Commonwealth of Pennsylvania, Department of Environmental Resources[1] (the Department), the Environmental Quality Board (EQB) and Arthur A. Davis, Secretary of Department (collectively the Commonwealth) asserting, *inter alia*, that the designation of an area unsuitable for mining in a portion of the Goss Run Watershed (Goss Run UFM) by the adoption of 25 Pa. Code § 86.130(b)(14) by the EQB was an unconstitutional taking of their coal.

On April 15, 1993 the Trial Court granted, in part, and denied, in part, the Commonwealth's preliminary objections and transferred the case to the Environmental Hearing Board. *Machipongo Land and Coal Co., Inc. v. Commonwealth*, 155 Pa. Cmwlth. 72, 624 A.2d 742 (Pa. Cmwlth. 1993) (*Machipongo I*). Both parties appealed and the Pennsylvania Supreme Court reversed and transferred the case to the Court of Common Pleas of Clearfield County for proceedings under the Eminent Domain Code. *Machipongo Land and Coal Co., Inc. v. Commonwealth*, 538 Pa. 361, 648 A.2d 767 (1994) (*Machipongo II*). After reargument the Pennsylvania Supreme Court vacated part of its 1994 decision and remanded the case to the Trial Court for further proceedings on the basis that the regulation alleged to have taken Property Owners' coal was adopted under the Commonwealth's police

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[1] In 1995, the General Assembly renamed the Department of Environmental Resources as the Department of Environmental Protection. Act of June 26, 1995 (P.L. 70, No. 194).

power rather than the power of eminent domain. *Machipongo Land and Coal Co., Inc. v. Commonwealth*, 544 Pa. 271, 676 A.2d 199 (1996) (*Machipongo III*).

On September 30, 1998 the Trial Court denied the Commonwealth's motion for summary judgment and created a new takings test. *Machipongo Land and Coal Co., Inc. v. Commonwealth*, 719 A.2d 19 (Pa. Cmwlth. 1998) (*Machipongo IV*). The Trial Court's Order of October 28, 1999, prohibited the Commonwealth from introducing evidence on the issue of whether the proposed mining activities constitute a public nuisance except to the extent Property Owners would be denied a permit to mine coal under the Surface Mining Act or regulations promulgated thereunder. Petitioners Appendix to their Petition for a Writ of Certiorari, (hereinafter Pet. App.) 99a-108a, Reproduced Record, (hereinafter, R.) 425a-433a. *Machipongo Land and Coal Co., Inc. v. Commonwealth*, No. 428 M.D. (Slip Opinion of October 28, 1999) (*Machipongo V*). The Trial Court's Order of December 28, 1999, R. 434a, prohibited the Commonwealth from presenting evidence: (1) on the extent of Property Owners' property holdings and productive uses of their property; (2) that the proposed mining would constitute a public nuisance; (3) that Property Owners would be denied a permit to mine coal under the Surface Mining Act or regulations promulgated thereunder; and, (4) on the nature and extent of the restrictions imposed by the regulation. The Trial Court further limited the issues for trial to the mineability of the coal, the nature of the affected stream and whether the stream is of a type for which the law would, *ipso facto*, prohibit mining activity to occur. Pet. App. 98a, R. 434a.

After trial, the Trial Court issued its Adjudication and Decree Nisi and Order on August 21, 2000 (*Machipongo VI*), Pet. App. 55a-97a, R. 436a, and ruled on the parties' Motions for Post-Trial Relief on September 25, 2000. R. 436a. In its

Adjudication the Trial Court struck down the Goss Run UFM designation as to the 27 acre Erickson/Naughton Surface Reserves and the 96 acre Machipongo Underground Reserves based on a finding that these reserves were economically mineable. The Trial Court upheld the regulation as to the 35 acre Machipongo Surface Reserves on a finding the reserves were not economically mineable. The Adjudication, as modified by the Order of September 25, 2000, was entered as final judgment on the docket on October 19, 2000.

Both parties appealed to the Pennsylvania Supreme Court and the Pennsylvania Supreme Court issued a decision on May 30, 2002. Pet. App. 1a-51a, *Machipongo Land and Coal Co., Inc. v. Commonwealth*, 799 A.2d 751 (2002) (*Machipongo VII*). The Pennsylvania Supreme Court reversed the Trial Court in part and remanded the case to the Trial Court for a new trial on four issues. The Pennsylvania Supreme Court affirmed that part of the Trial Court's decision that upheld the regulation as applied to the Machipongo Surface Reserves.

The Property Owners filed a Petition for a Writ of Certiorari (Petition) with this Court on August 27, 2002 and it was entered on the docket on September 3, 2002.

UFM Regulation in Question

On May 26, 1989 the Commonwealth accepted a petition to designate the 1,830 acre Goss Run Watershed, Clearfield County as unsuitable for mining in accordance with Section 4.5 of the Surface Mining Act, (52 P.S. § 1396.4e), Section 315 of the Clean Streams Law, (35 P.S. § 691.315) (CSL) and 25 *Pa. Code* §§ 86.101-86.129. R. 257a, 267a-268a. The Department conducted a study and recommended to the EQB and the EQB adopted a regulation, under the authority of Section 4.5(a), (b)(1)-(2) of the Surface Mining Act, (52 P.S. § 1396.4e(a), (b)(1)-(2)) and Section 315 (h)-(o) of the CSL (35 P.S. § 691.315(h)-(o)), designating 390 acres of the Goss

Run Watershed as unsuitable for surface mining which was published in the *Pennsylvania Bulletin* and became effective on May 23, 1992. R. 258a-259a. The Property Owners stipulated the regulation designated approximately 390 acres of the Goss Run Watershed as unsuitable for mining and not the 555 acres as they state in their Petition. R. 259a, 261a, and 278a. The regulation does not involve the physical invasion of Property Owners' lands or the appropriation of their coal, does not prohibit the filing of a mining permit application but does generally bar the issuance of a permit for surface mining and for surface activities related to underground mining until the regulation is modified or terminated as provided by law. R.262a, 52 P.S. § 1396.4e(f), 35 P.S. § 691.315(m); 25 *Pa. Code* § 86.123(d).

The purpose of the regulation is to protect the hydrologic balance and water quality of Goss Run, which supports a naturally reproducing Brook Trout population and a stocked trout fishery in the Brisbin Dam; to protect the Pennsylvania Fish and Boat Commission's and local sportsmen's club's use of these waters as a recreational fishery; and, to protect the use of this area as a public park. R. 270a. Brisbin Dam is a 2.5 acre man-made impoundment fed by Goss Run and is located within a 14 acre public park owned by the Borough of Brisbin. R. 260a, 276a.

Petitioners' Property

Machipongo is vested with fee simple title to 373 [2] acres situated within the UFM area and a fee simple title to 200 acres and title in the coal estate of 1,000 acres situated outside but contiguous to the UFM area. R. 260a, 403a-405a. Machipongo also stipulated it acquired its property by "virtue

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[2] The stipulations regarding the Property Owners total acreage within the UFM area is not the total acreage designated unsuitable for mining. Property Owners do not own all of the land affected by the regulation. R. 652a, 413a.

of a deed dated December 31, 1952," R. 260a. Machipongo has not owned land in Clearfield County, Pennsylvania as early as 1915 as Petitioners assert. Petition at 4. At the trial Machipongo identified its property as one contiguous tract which is shown as the pink shaded area on Stipulated Exhibits S-40A as overlain by S-40C. R. 403a and R. 405a, respectively. These exhibits were prepared by the Property Owners, introduced at trial, and are reproduced and attached as Respondents' Appendix A. (Res. App. 1a). The Property Owners also identified the Machipongo property as one contiguous tract outlined in blue on Respondents' Appendix B. (Res. App. 2a) which the Property Owners attached to their Complaint as Exhibit A. R. 260a, 414a, 403a-405a. Machipongo's total coal reserves within the UFM area include 310 acres capable of being mined although only 131 acres were being claimed as mineable because of regulatory boundary and exclusion zones. R. 44a. The 131 acres consists of a 35 acre surface mine tract east of Goss Run and a 96[3] acre underground mine tract west of Goss Run. Machipongo also asserted a claim for an additional 23 acres immediately adjacent to the west of the Goss Run UFM area.

When the regulation was adopted Joseph Naughton was vested with title to a 1/5 interest and Erickson was vested with title to a 4/5 interest in the coal estate of 52 acres within the UFM area and a fee simple title to 1,150 acres and 250 acres of coal estate situated outside to the east, north and west of but contiguous to the UFM area. R. 260a, 265a, 414a, 403a-405a.[4] The Property Owners identified the Erickson/Naughton property at trial as one contiguous tract shaded in yellow on Stipulated Exhibits S-40A as overlain by S-40C.

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[3] The Trial Court found that only the 96 acre portion of the tract was economically mineable. The 96 acre portion of the larger 1,573 acre tract is approximately 6% of the total acreage.

[4] Stipulated Exhibit S-13B states that the Erickson/Naughton parcel is 1,350 acres. R. 364a.

R. 403a and R. 405a. These stipulated exhibits were prepared by the Property Owners and are reproduced and attached. (Resp. App. 1a.) The Erickson/Naughton property is also shown by the Property Owners as one contiguous tract outlined in green on Appendix B, which Property Owners prepared and attached to their Complaint as Exhibit A. (Resp. App. 2a.). Of the 52 acres within the UFM area capable of being mined only 27 acres are being claimed as mineable because of boundary and exclusion zones. R. 42a.[5] The Property Owners' coal estates include the Upper Freeport (UF), Lower Freeport (LF), Upper Kittanning (UK), Middle Kittanning (MK), Lower Kittanning (LK), Brookville and Mercer coal seams but the regulation only limits surface mining of the UF, LF, UK, and MK seams. R. 259a.

Uses of Property

Although the Trial Court's December 28, 1999 Order denied the Commonwealth's request to introduce evidence on the issue of the extent and uses of Property Owners' property, the record contains some evidence. Property Owners have leased their land for gas development in the past and have sold timber from their land. R. 262a-263a. The entire 1,350 acre Erickson/Naughton parcel was leased for surface mining and said lease was restated and assigned in 1996. Permits to surface mine 541 acres of the Erickson/Naughton property outside the regulated area were issued after the effective date of the regulation. R. 262a-263a, 1074a. Royalties have been received under the lease for the 1,350 acre Erickson/ Naughton property. R. 1049a. Machipongo leased 419 acres of its property for surface coal mining. R. 548a-552a, 559a.

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[5] The Trial Court found that only the 27 acre portion of the tract was economically mineable. The 27 acre portion of the 1,350 acre contiguous tract is only 2% of the total acreage.

ARGUMENT

I. THE SUPREME COURT LACKS JURISDICTION TO DECIDE THIS CASE UNDER SECTION 1257.

A. The Pennsylvania Supreme Court's Decision Is Not A Final Judgment Or Decree Within The Meaning Of Section 1257.

Congress has vested the United States Supreme Court with jurisdiction to review federal question decisions made by state courts from the earliest day of the Judiciary so long as the State's judgment is final. *See* Judiciary Act of 1789, § 25,1 Stat. 85. The current statute regulating the Supreme Court's jurisdiction is 28 U.S.C. § 1257, and this provision establishes a firm final judgment rule. *Jefferson v. City of Tarrant*, 522 U.S. 75, 118 S.Ct. 481 (1997).[6]

The Pennsylvania Supreme Court's decision in this case is not a final judgment or decree within the meaning of Section 1257. The Pennsylvania Supreme Court reversed the Trial

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[6] In *Jefferson v. City of Tarrant*, the Supreme Court stated: To be reviewable by this Court, a state-court judgment must be final "in two senses: it must be subject to no further review or correction in any other state tribunal, it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551, 65 S.Ct. 770, 773, 89 L.Ed. 1171 (1945). As we have recognized, the finality rule "is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124, 65 S.Ct. 1475, 1478, 89 L.Ed. 569 (1945). *Jefferson v. City of Tarrant*, 522 U.S. at 81, 118 S.Ct. at 485-86.

Court's decision that a regulatory taking had occurred [7] and remanded the case. The Pennsylvania Supreme Court held:

> We, therefore reverse the Commonwealth Court's determination that a taking occurred and remand this case to the Commonwealth Court to: (1) horizontally define the relevant property: (2) conduct the *Lucas* analysis with regard to the property of the Naughton/Erickson Property Owners; (3) conduct the *Penn Central* analysis with regard to the property of both Property Owners; and, if necessary, (4) determine whether the proposed use would constitute a nuisance or would otherwise violate state property law.

Pet. App. at 50a. *Machipongo VII*, 799 A.2d at 775. Until the Trial Court addresses these four issues and resolves all of Property Owners' outstanding takings claims, there is no final judgment or decree within the meaning of Section 1257.[8]

B. This Case Does Not Fit Within The Limited Set Of Situations Identified In *Cox Broadcasting*.

Normally the finality doctrine contained in Section 1257 is not satisfied if the state courts still must conduct further substantive proceedings before the rights of the parties as to the federal issues are resolved. *Radio Station WOW, Inc. v.*

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[7] The Trial Court had declared that the government regulation constituted a regulatory takings under the categorical taking test announced in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886 (1992). Pet. App. 60a, *Machipongo VI*.

[8] The Pennsylvania Supreme Court affirmed a portion of the Trial Court's decision that upheld the Goss Run UFM regulation as applied to one of three proposed mine sites (Machipongo Surface Reserves) because the coal in that area was not economically mineable. Pet. App. 50a-51a, *Machipongo VII*, 799 A.2d at 775. Property Owners have challenged the factual basis for this decision. See Petition at 27-29, Commonwealth's Brief at pages 24-26.

Johnson, 326 U.S. 120, 123-127, 65 S.Ct. 1475. 1477-1480 (1945). In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029 (1975) this Court recognized that there are at least four categories of cases in which jurisdiction is proper even when there are further proceedings anticipated in the state court.[9]

In their Petition, Property Owners make the mistaken assertion that this Court has appellate jurisdiction under 28 U.S.C. § 1257. Petition at 6, n.1. Property Owners assert two bases under *Cox Broadcasting* for their assertion: "all federal legal questions have been conclusively decided and cannot be affected by further state court proceeding"; and "the federal issue will survive and require decision regardless of the outcome of future state court proceedings." Petition at 6, n.1. For the reasons set forth below, none of the issues raised by Property Owners in their Petition[10] fit within any *Cox Broadcasting* category.

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[9] The categories are: 1. The federal issue is conclusive or the outcome of the further proceedings is preordained. 2. The federal issue will survive and requires a decision regardless of the outcome of the state proceedings. 3. The Supreme Court will not be able to review the federal issue later. 4. The state judgment finally disposed of the federal issue, reversal by the Supreme Court would terminate the state action and the Supreme Court's refusal to review the federal issue might seriously erode federal policy. *Cox Broadcasting*, 420 U.S. at 479-482, 95 S.Ct. at 1038-1040; Vol. 22 Moore's, Federal Practice, § 406.03[3][d][I] (Matthew Bender 3d. ed. 2002).

[10] The Pennsylvania Supreme Court decided, *inter alia*, several questions that Property Owners want to challenge: that the parcel as a whole rule remains applicable in takings cases; that a regulation that affects coal rights held as part of a fee simple title passes the *Lucas* categorical test where the property, held in fee simple, has other viable uses; that the Commonwealth is entitled to present evidence that the regulation in question is consistent with background principles of nuisance law; and that there was no basis to alter certain factual findings of the Trial Court. Pet. App. 33a, 34a, 50a and 51a. *Machipongo VII*, 799 A.2d at 768, 775.

C. A State Judgment In A Regulatory Takings Case Is Not Final Under Section 1257 Unless It Addresses Both The Takings And The Payment Of Just Compensation.

This is a regulatory takings case in which Property Owners seek to invalidate a state mining regulation and secure compensation for the alleged regulatory taking. Petition at 2. In *Cox Broadcasting*, this Court decided that eminent domain proceedings, which involve a takings and the payment of just compensation, are not final unless the decision "covers both aspects of that integral problem." *Cox Broadcasting*, 420 U.S. at 477, 95 S.Ct. at 1037, n.6. A regulatory takings case is similar to an eminent domain proceeding because it also involves one federal question—is there a takings—with another (that needs to be decided if there is a taking)—what compensation is available. A state regulatory takings decision is not final under the rule in *Cox Broadcasting* unless it addresses both aspects of the integral takings issue.[11]

Neither the taking nor the compensation aspects of this takings case are final. Because the Pennsylvania Supreme Court reversed the Trial Court's takings findings, the Pennsylvania Supreme Court declined to address the damages issue "because it is not clear, at this juncture whether a takings will be found." Pet. App. 51a., *Machipongo VII*, 799 A. 2d at 775. Until both aspects of the case, the takings and

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[11] Although Property Owners recognize that this Court has decided that eminent domain proceedings are of the type that are not final until both the takings and compensation issues are decided, Property Owners attempt to distinguish regulatory takings cases from the eminent domain proceedings rule announced in *Cox Broadcasting*. Petition at 6, n.1. Although the source of the government's power is different in these two types of cases, (police power verses power of eminent domain) regulatory takings cases are also of the type involving two federal issues that both must be addressed before the "judgment or decree" is final within the meaning of Section 1257.

subsequent compensation issues, are addressed in state court, the decision in this regulatory takings case is not final under *Cox Broadcasting*.

II. PENNSYLVANIA SUPREME COURT HAS PROPERLY REJECTED THE EXPANSION OF THE SCOPE OF THE *LUCAS* CATEGORICAL TAKING ANALYSIS.

Property Owners have asked this Court to greatly expand the scope of the categorical takings analysis in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886 (1992), by segmenting their contiguous property holdings from both a horizontal and vertical perspective. Because the regulation only affects a small portion of Property Owners' contiguous property (2% of Erickson/Naughton—27 acres of à 1,350 contiguous acre parcel and approximately 6% of Machipongo's property—96 acres of a 1,573 acre contiguous parcel), Property Owners can only fit within the *Lucas* categorical analysis if this Court segments the other contiguous property and other vertical property rights from the narrow property interest affected by the Goss Run UFM regulation. The Pennsylvania Supreme Court declined to expand the scope of *Lucas* categorical analysis and followed this Court's parcel as a whole takings jurisprudence. For the reasons set forth below, this Court should also reject Property Owners' request to expand the *Lucas* categorical approach.

A. Pennsylvania Supreme Court's Decision Is Consistent With This Court's Decisions On The Parcel As A Whole Rule From The Horizontal Perspective.

1. Parcel As A Whole Rule Remains The Appropriate Rule To Follow In This Case.

Property Owners have asked this Court to disregard its prior precedent, overturn the parcel as a whole rule and

replace it with the regulated property approach.[12] Petition at 19-24. The regulated property approach has the effect of expanding the scope of the "relatively rare" *Lucas* type categorical taking in which a property owner has lost all economic value as a result of a government regulation. The regulated property approach only considers the narrow property rights affected by the government regulation and disregards all other property rights and other beneficial uses of those rights. Under this approach the "relatively rare" *Lucas* categorical taking will be the rule and not the exceptional situation. *See* generally *Concrete Pipe and Products of Calif., Inc. v. Construction Laborers Pension Trust for Southern Calif.*, 508 U.S. 602, 643-44, 113 S.Ct. 2264, 2290 (1993). ("To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property is all or only a portion of, the parcel in question.")

This Court recently rejected an invitation to expand the *Lucas* categorical rule and reaffirmed the rule that the relevant parcel in a takings case is the entire property or the parcel as a whole. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. ___, 122 S.Ct. 1465, 1489 (2002). *See* also *Andrus v. Allard*, 444 U.S. 51, 100 S.Ct. 318 (1979); *Concrete Pipe* and *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448 (2001). In *Penn Central*, this Court stated that takings jurisprudence "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 130-131, 98 S.Ct. at 2662 (1978) (emphasis added). Instead, this Court stated in *Penn Central* that it focuses "both on the character of the action and on the

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[12] The Pennsylvania Supreme Court rejected the regulated property approach that the Trial Court applied. Pet. App. 34a-35a, *Machipongo VII*, 799 A.2d at 768.

nature and extent of the interference with rights in the parcel as a whole." Ibid. (emphasis added). In *Keystone*, this Court concluded that the "27 million tons of coal do not constitute a separate segment of property for takings law purposes" and that "[t]here is no basis for treating the less than 2% of petitioners' coal as a separate parcel of property." *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 498-499, 107 S.Ct. 1232, 1249 (1987). As in *Keystone*, the Goss Run UFM regulation only affects 2% of the Erickson/Naughton parcel and approximately 6% of the Machipongo parcel.[13]

The Trial Court decided the relevant parcel was the regulated coal estate within the Goss Run UFM area and denied the Commonwealth's request to introduce evidence concerning the extent of Property Owners' property holdings and the beneficial uses of this property.[14] Consequently, the Commonwealth never had the opportunity to establish a complete record as to the relevant parcel for each Property Owner's claim. The Pennsylvania Supreme Court rejected the Trial Court's regulated property approach and directed the Trial Court to determine the relevant parcel under the parcel as a whole analysis.

The Pennsylvania Supreme Court also identified factors which should be considered in determining the relevant parcel. These factors include: "unity and contiguity of ownership, the dates of acquisition, the extent to which the proposed parcel has been treated as a single unit, the extent to which the regulated holding benefits the unregulated holdings; the timing of transfers, if any, in light of the developing regulatory environment." Pet. App. 35a, *Machipongo VII*, 799 A.2d at 768-769. All of these factors

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[13] *See* discussion on pages 4-6 of this Brief.

[14] *See* discussion on page 2 of this Brief.

are to be considered in defining the relevant parcel as a whole as opposed to merely looking at the regulated portion of the property.

In *Keystone, Penn Central, Palazzolo, Concrete Pipe, Andrus* and *Tahoe-Sierra* this Court rejected claimants' attempts to conceptually sever the regulated portion of the property from the parcel as a whole for the takings analysis. The Pennsylvania Supreme Court's decision to reject the Trial Court's regulated land approach is consistent with this Court's takings jurisprudence.

Finally, this issue concerning the size of the parcel as a whole is not a final judgment or decree under Section 1257 and *Cox Broadcasting*. The Pennsylvania Supreme Court has remanded the issue concerning the relevant parcel to the Trial Court for resolution.

2. *The Basis For Discomfort With The Parcel As A Whole Rule Is Not Present Under The Facts Of This Case.*

In *Palazzolo* this Court recognized that it previously "expressed discomfort with the logic of the [parcel as a whole] rule" in footnote 7 of the *Lucas* decision.[15] *Palazzolo*, 121 S.Ct. at 2465.[16] Footnote 7 in *Lucas* describes the factual

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[15] In *Palazzolo* this Court declined to revisit the parcel as a whole rule and rejected the property owner's *Lucas* categorical claim on the basis of the entire parcel, and held that the owner's ability to place a single dwelling on one lot of a 74 lot development precluded a *Lucas* type categorical taking. *Palazzolo*, 533 U.S. at __, 121 S.Ct. at 2465.

[16] In this footnote in *Lucas* Justice Scalia noted: Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the

basis for the Court's discomfort; a regulation which requires a developer to leave 90% of a tract in its natural state. Notwithstanding this noted discomfort, there are no decisions in which this Court has deviated from the parcel as a whole rule.[17]

The factual basis for the discomfort with the parcel as a whole rule is not present under the facts of this appeal. The Trial Court found that only 27 acres or 2% of the Erickson/Naughton parcel was affected by the regulation and only 96 acres or approximately 6% of the Machipongo parcel was affected. 98% and 94% of Property Owners' parcels remain unaffected by the Goss Run UFM in sharp contrast to the example used in *Lucas* where 90% of the parcel was affected by the regulation. These vast portions of Property Owners' parcels retain substantial economic value as evidenced by the coal leases, royalty payments, mining permits and mining operations that are described in the record. *See* e.g., R. 262a-263a, 552a, 1049a, and 1074a. Because there is no factual basis for discomfort with the parcel as a whole rule, this Court should again follow the parcel as a whole rule as it did recently in *Tahoe-Sierra*.

B. The Pennsylvania Supreme Court Properly Decided The Vertical Segmentation Issue.

Property Owners have misconstrued the Pennsylvania Supreme Court's decision and have misapplied this Court's decisions on the issue of vertical segmentation of individual property rights. Property Owners assert that coal property rights are unique among all property rights[18] and that

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owner has suffered a mere diminution in value of the tract as a whole. . . *Lucas*, 505 U.S. at 1016-17, n.7., 112 S.Ct.at 2894, n.7. (1992).

[17] *See e.g., Penn Central, Keystone, Concrete Pipe, Palazzolo,* and *Tahoe-Sierra.*

[18] Property Owners recognize that the Pennsylvania Supreme Court has already rejected the position they propose for minerals other than coal

Property Owners' takings claims should be analyzed only with respect to a portion of the coal property rights ignoring all other vertical property rights. The Pennsylvania Supreme Court correctly decided that this approach is not authorized under state or federal law, and it violates the parcel as a whole rule followed by this Court. Pet. App. 30a-34a, *Machipongo VII*, 799 A.2d at 766-768.

The Pennsylvania Supreme Court correctly decided that where a property owner's title is in fee simple and a regulation limits the use of one stick (the coal estate) in the entire bundle of rights, that one stick is not to be conceptually severed from the entire bundle for purposes of a takings claim analysis. The Pennsylvania Supreme Court decided that such vertical segmentation in a takings analysis is not appropriate even though Pennsylvania property law recognizes that the coal estate can be held as a separate estate.

Machipongo stipulated that it is vested with fee simple title, the complete bundle of rights, to 373 acres within the UFM area. R. 260a. At the trial Machipongo claimed the UFM designation took a 35 [19] acre area and a 96 [20] acre area of its coal estate within the 373 acres Machipongo owns in

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under Pennsylvania law. Petition at 18, n.7. *See Miller & Sons Paving Inc. v. Plumstead Twp.*, 552 Pa. 652, 717 A.2d 483 (1998).

[19] Machipongo claimed the regulation only took the Lower Freeport, Upper Kittanning and Middle Kittanning coal seams in the 35 acre area, R. 506a -R. 509a, and did not claim it took the Lower Kittanning, Brookville, or Mercer coal seams, R. 488a, even though Machipongo stipulated their coal estate included these coal seams. R. 259a.

[20] Machipongo claimed the regulation only took the Middle Kittanning and Lower Kittanning coal seams in the 96 acre area but did not claim it took the Upper Freeport, Lower Freeport, Upper Kittanning, Brookville and Mercer coal seams, R. 488a, even though Machipongo stipulated they were part of its coal estate. R. 259a. Petitioners admitted at trial that surface mining the Lower Freeport and Middle Kittanning coal seams would destroy Goss Run. R. 626a-627a, 951a.

fee within the UFM area. The Trial Court only considered a portion of one stick from Machipongo's complete bundle of rights, a portion of the coal estate, when it found the regulation took Machipongo's coal estate in the 96 acre area. The Pennsylvania Supreme Court looked to this Court's takings jurisprudence regarding the conceptual severance of property for its takings analysis. The Pennsylvania Supreme Court correctly concluded this Court's takings jurisprudence does not condone the conceptual severance of the regulated portion of the property from the entire parcel as a whole. Pet. App. 30a-34a, *Machipongo VII*, 799 A.2d at 766-78.

1. Pennsylvania Supreme Court's Decision Is Consistent With Keystone *And Later Decisions.*

Property Owners apparently misunderstand the Pennsylvania Supreme Court's interpretation of *Keystone* as they argue, in response to the Pennsylvania Supreme Court's reading of *Keystone*, that "this Court did not reject the division of estates represented by Pennsylvania property law." Petition at 13-14. They are correct that this Court did not reject the division of estates but, the Pennsylvania Supreme Court never said this Court rejected the division of estates. The Pennsylvania Supreme Court correctly noted that this Court, for purposes of a takings analysis, did not recognize the division of estates within a single parcel of land as a relevant consideration. The Pennsylvania Supreme Court correctly noted that this Court's "takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights." Pet. App. 30a, *Machipongo VII*, 799 A.2d at 766.

In *Keystone* this Court rejected claimants attempts to physically sever the coal required to be left for surface support from the coal which could be mined concluding that "[t]he 27 million tons of coal do not constitute a separate segment of property for takings law purposes." *Keystone*,

480 U.S. at 498, 107 S.Ct. at 1248. This Court also rejected claimants' attempt to conceptually sever the support estate from the mineral estate even though Pennsylvania law recognized the support estate as a separate property interest. In *Keystone* this Court, relying on *Penn Central* and *Andrus*, held "takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights." *Keystone*, 480 U.S. at 500, 107 S.Ct. at 1250.

The Pennsylvania Supreme Court correctly interpreted this Court's ruling in *Keystone* stating "[T]he U.S. Supreme Court held that the property as a whole was the unit of inquiry." Pet. App. 30a, *Machipongo VII*, 799 A.2d at 766. The Pennsylvania Supreme Court applied *Keystone* to this case and ruled "the relevant parcel cannot be vertically segmented and must be defined to include both the surface and mineral rights." Pet. App. 30a, *Machipongo VII*, 799 A.2d at 768. The Pennsylvania Supreme Court's decision not to vertically segment the coal rights from the other rights held in fee is fully consistent with this Court's decisions.[21]

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[21] Contrary to Property Owners' assertion, Petition at 11, the Pennsylvania Supreme Court's decision is fully consistent with this Court's decisions applying the parcel as a whole rule. *See e.g. Penn Central*, 438 U.S. at 130-131 (rejection of vertical severance of air rights over train station from surface rights); *Andrus* (rejection of a conceptual severance of the right to sell feathers of federally protected birds from the rights to possess, transport, donate and devise the property); *Concrete Pipe*, 508 U.S. at 643, 113 S.Ct. at 2290 (rejection of claimants attempt to "shoehorn its claim" into the *Lucas* analysis by "asserting that '[t]he property of [*Concrete Pipe*] which is taken, it taken in its entirety.'"); *Palazzolo*, 533 U.S. at __, 121 S.Ct. at 2465 (rejection of invitation to overrule the "property as a whole" rule); and, most recently, *Tahoe-Sierra* 535 U.S. at __ , 122 S.Ct. at 1483 (rejection of attempt to temporally segment a fee simple interest in property into the period of the temporary moratorium on development and all other interests in the property). Each of these cases apply this Court's parcel as a whole rule that is the basis of the Pennsylvania Supreme Court's decision.

2. *The Pennsylvania Supreme Court Declined To Grant The Coal Estate Special Status Under Pennsylvania Property Law In A Regulatory Takings Case.*

The Property Owners have asked this Court to reverse the Pennsylvania Supreme Court and establish a rule which grants special status to the coal estate in Pennsylvania in a regulatory takings challenge. Pet. at 17-19. They have asked this Court to require Pennsylvania courts to evaluate a coal estate takings claim solely on the basis of the regulated portion of the coal estate because Pennsylvania property law recognizes that the coal estate can be held as a separate estate even though the property is held in fee and the coal estate is merely one stick in the entire bundle of property rights.

Property Owners' lengthy vertical segmentation argument can be summarized as "this Court, and not the Pennsylvania Supreme Court, should decide Pennsylvania property law and this Court should reverse *Keystone, Penn Central, Andrus, Palazzolo and Tahoe-Sierra* and vertically sever the coal estate from the entire bundle of property rights just because Pennsylvania property law recognizes the coal estate can be held as a separate property interest." The Property Owners' argument is really no different than the claimants' argument in *Keystone* where claimants argued that because Pennsylvania property law recognized the support estate as a separate property interest the support estate should be severed from their other property interests. Property Owners' argument is less compelling than the *Keystone* claimants' unsuccessful argument because Property Owners' are arguing for the severance of the coal estate from the complete bundle of property rights instead of just severing the support estate from the jointly held coal and support estates.

Not only is Property Owners' argument less compelling than the *Keystone* claimants, but, as regards to the Machipongo property, it is much like *Andrus*. Property

Owners note that in *Andrus* this Court held: "At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety." Petition at 18, n.7. As previously noted, Machipongo stipulated it possesses the full bundle of property rights. The Trial Court noted that if it considered any property other than the coal estate, then there would be no taking. The Trial Court stated:

> The Commonwealth suggests we should calculate the denominator based on finding [Property] Owners' rights in the coal estate are just part of the bundle of rights they own in land. If we were to do so, there would be no taking because [Property] Owners do not dispute that they still have surface rights that can be used and they would not be deprived of all economic use of their land.

Pet. App. 38a, *Machipongo IV*, 719 A.2d at 28. The Trial Court adopted the Property Owners' vertical segmentation approach and evaluated their takings claims solely on the basis of the narrow regulated portion of their coal estate. The Pennsylvania Supreme Court rejected such a vertical segmentation, decided that the coal estate does not have special status in takings cases under Pennsylvania property law and correctly applied the parcel as a whole rule.

III. PENNSYLVANIA SUPREME COURT CORRECTLY ADDRESSED THE BACKGROUND PRINCIPLE OF NUISANCE LAW.

To evaluate the Property Owners' argument on the background principles of nuisance law issues, it is necessary to describe how this issue was addressed by the Trial Court and subsequently resolved by the Pennsylvania Supreme Court. The background principles of nuisance and property law are important because under this Court's precedent a government regulation that deprives a person of all

economically beneficial use of land is nevertheless not a regulatory taking if the regulation does no more than duplicate the results that could have been achieved under background principles of nuisance and property law. *Lucas*, 505 U.S. at 1028, 112 S.Ct. at 2900.

A. Trial Court Denied Commonwealth's Repeated Requests To Introduce Any Evidence On The Background Principles Of Nuisance Issue.

At trial, Property Owners challenged the Goss Run UFM under this Court's *Lucas* categorical test.[22] At trial the Commonwealth sought to introduce evidence on the background principles of nuisance and property law issue. The Commonwealth wanted the opportunity to establish that the regulation protected a stream and related public resources from pollution, the same restrictions that the Commonwealth's law of property and nuisances already place upon land ownership in Pennsylvania.

In a series of orders, the Trial Court denied the Commonwealth the opportunity to present evidence that the proposed mining constituted a public nuisance.[23]

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[22] This is the analysis the trial court applied to determine the regulation constituted a regulation takings. Pet. App. 60a, *Machipongo VI*.

[23] In its October 28, 1999 Memorandum Opinion the Trial Court decided that the Commonwealth would not be allowed to introduce evidence on the issue of whether Property Owners' proposed mining activities constitute a public nuisance. Pet. App. 99a-108a. The October 28, 1999 Order accompanying its Memorandum Opinion included an exception which allowed the Commonwealth to introduce evidence on the public nuisance factor "to the extent that Property Owners would be denied a permit to mine coal under the Surface Mining Act or the regulations promulgated thereunder." Because virtually all the evidence which the Commonwealth planned to introduce, fit within this exception, the Commonwealth sought clarification from the Trial Court in its Motion in Limine concerning the scope of the exception. In its December 28, 1999 Order the Trial Court denied the Commonwealth's Motion in

B. Pennsylvania Supreme Court Remanded The Case To Give The Commonwealth The Opportunity To Introduce Evidence On The Background Principles Of Nuisance Law.

The Pennsylvania Supreme Court recognized that the Trial Court "prevented the Commonwealth from presenting evidence regarding whether the proposed use of the land would constitute a nuisance". Pet. App. 42a, *Machipongo VII*, 799 A. 2d at 771. Consequently, the Pennsylvania Supreme Court reversed the Trial Court and remanded the case to consider evidence whether the proposed use constituted a public nuisance.

The Pennsylvania Supreme Court recognized the well established common law nuisance principle that polluting the waters of the Commonwealth constitutes a public nuisance. Pet. App. 41a-50a, *Machipongo VII*, 799 A.2d at 773 citing *Commonwealth v. Barnes & Tucker, Co.*, 455 Pa. 392, 319 A.2d 871 (1974) and *Pennsylvania R.R. Co. v. Sagamore Coal Co.*, 281 Pa. 233, 126 A. 386 (1924). The Pennsylvania Supreme Court decided that "although mining is not a nuisance per se, pollution of a public waterway is." Pet. App. 49a, *Machipongo VII*, 799 A.2d at 774. Because the Commonwealth adopted the Goss Run UFM to protect a portion of Goss Run from pollution, the Pennsylvania Supreme Court decided that the Commonwealth was entitled to present evidence to establish that the regulation protected this public waterway from pollution.

Limine and further limited the issues for the upcoming trial. Pet. App. 98a. The Trial Court's December 28, 1999 Order precluded the Commonwealth from presenting any evidence concerning the background principles of nuisance law.

C. Property Owners Want This Court To Prejudge The Background Principles Of Nuisance Law Issue Before Trial.

In their Petition, Property Owners have asked this Court to prejudge the background principles of nuisance law issue based upon the limited record that was developed at trial where the Trial Court prevented the Commonwealth from presenting its evidence on the background principles of nuisance law issue. The Trial Court limited the issues at trial to the economic mineability of the property.[24] The Trial Court allowed evidence concerning several nearby coal mines on the issue of the economic mineability of Property Owners' proposed mining plans.[25] Property Owners want this Court to prejudge the background principles of nuisance law issue without the benefit of a complete record.

The Commonwealth evaluated the presence of nearby mining operations when it adopted the regulation in question to protect Goss Run from pollution.[26] The Commonwealth decided that the regulation protecting Goss Run from pollution was needed notwithstanding the nearby permitted

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[24] The Trial Court identified a second issue "the nature of the affected stream and whether the stream is of a type for which the law would, *ipso facto*, prohibit mining to occur." Pet. App. 98a. No evidence on this issue was introduced because the parties stipulated that Goss Run is a Cold Water Fishes (CWF) stream under the Commonwealth's Water Quality Standards program, 25 *Pa. Code* § 93.1 et seq., and a CWF stream is not the type of a stream for which the law would, *ipso facto*, prohibit mining to occur. Pet. App., 93a. *Machipongo VI*.

[25] The Commonwealth recognizes that the presence of nearby permitted coal mines is a consideration in the background principles of nuisance law analysis, but it is not the sole consideration that precludes the Commonwealth from presenting evidence to support its position. *Lucas*, 505 U.S. at 1031, 112 S.Ct. at 2901.

[26] The regulation on its face recognizes the existence of two nearby mining permits. 25 Pa. Code § 86.130(b)(14), Pet. App. 142a.

mining operations. *See* 22 Pa. B. 2715 (May 23, 1992). A complete record on the background principles of nuisance law issue would establish why the Goss Run UFM is needed to protect Goss Run from pollution.

D. The Background Principles Of Nuisance Law Issue Does Not Fit Within Any *Cox Broadcasting* Category.

The Pennsylvania Supreme Court has not finally decided the background principles of nuisance and property law issue.[27] The Pennsylvania Supreme Court has merely reversed and remanded the matter to the Trial Court to allow the Commonwealth the opportunity to present evidence on this issue because the Trial Court improperly prevented the Commonwealth from presenting any evidence at the earlier trial.

Allowing the Commonwealth to present evidence at trial on the background principles of nuisance and property law issue is not a federal issue that fits within one of the *Cox Broadcasting* categories identified by the Property Owners as providing the basis for jurisdiction under Section 1257. Allowing the parties to establish a complete record at trial is not conclusive, and the outcome of the future proceedings is

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[27] Property Owners object to the Pennsylvania Supreme Court's decision that the Commonwealth has the right to prevent public nuisances before they occur under Pennsylvania nuisance law. Petition at 27. Under Property Owners' view the Commonwealth would have to wait until the nuisance occurred before being able to act under the background principles of nuisance law recognized in *Lucas*. Property Owners' position leads to the absurd result that the public would have to endure the stream pollution and loss of other related public resources before it could act to protect them. The Pennsylvania Supreme Court rejected this absurd position and correctly decided that the Commonwealth has the common law nuisance authority to prevent pollution of Commonwealth waters before the pollution occurs. Pet. App. 49a, *Machipongo VII*, 799 A.2d at 774-785.

not preordained. Moreover, the background principles of nuisance law issue may not be reached in the state proceedings if the takings claims are rejected under the *Lucas* or *Penn Central* analysis that the Pennsylvania Supreme Court ordered the Trial Court to undertake upon remand.

IV. TRIAL COURT'S FACTUAL FINDINGS ARE NOT A FEDERAL ISSUE THAT FITS WITHIN ANY *COX BROADCASTING* CATEGORY.

Property Owners have asked this Court to exercise its jurisdiction to review the Pennsylvania Supreme Court's decision to affirm the Trial Court's factual findings concerning the thickness of a particular coal seam and the related finding that the Machipongo Surface Reserves was not economically mineable. Petition at 29. The factual findings concerning the thickness of the particular coal seam and the related findings concerning the economic mineability of that proposed mine site supported the Trial Court's determination that the regulation was not a regulatory taking of the Machipongo Surface Reserves. The Pennsylvania Supreme Court affirmed the Trial Court's determination that property without value cannot be taken.[28] Pet. App. 50a-51a. *Machipongo VII*, 799 A.2d at 775.

The factual findings at issue here are not federal issues, but even if they were they would not fit within one of the narrow categories identified in *Cox Broadcasting* that Property Owners attempt to rely upon. Neither factual finding rises to the level of a federal issue that is conclusive or preordains the

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[28] Property Owners fail to recognize that the Pennsylvania Supreme Court only affirmed this narrow legal point—property without value cannot be taken—and rejected the Trial Court overall legal reasoning. Petition at 29, n. 11. Moreover, Property Owners have not challenged this narrow legal point, but they have only challenged the factual basis for its application.

outcome of future proceedings or will survive and require decision regardless of the outcome of the future state court proceedings.

Property Owners have also misconstrued this Court's decision in *Hunt v. Cromartie*, 532 U.S. 234, 121 S.Ct. 1452, rehearing denied, 532 U.S. 1076, 121 S.Ct. 2239 (2001), as providing a basis for this Court to exercise its Section 1257 jurisdiction. Petition at 27-30. This Court's decision in *Hunt v. Cromartie* provides an additional basis to reject Property Owners' request to reverse certain of Trial Court's factual findings.

In this case, now before this Court, the Pennsylvania Supreme Court was an intermediate appellate court that reviewed the Trial Court's factual findings. The Pennsylvania Supreme Court specifically reviewed the factual findings in question[29] and determined there was no basis to alter the Trial Court's factual findings. Pet. App. 50a-51a, *Machipongo VII*, 799 A.2d 775. In *Hunt v. Cromartie* this Court stated that "Where an intermediate court reviews, and affirms a trial court's factual findings, this Court will not lightly overturn the concurrent findings of two lower courts." [citations omitted] *Hunt v. Cromartie*, 121 S.Ct. at 1458-59. This Court should not lightly overturn the concurrent factual findings of the Trial Court and the Pennsylvania Supreme Court on issues that were extensively briefed before both lower courts.[30]

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[29] Before the Pennsylvania Supreme Court, the Property Owners extensively briefed their challenge to these Trial Court's factual findings. Property Owners' Pennsylvania Supreme Court Brief at pages 50-62. The Commonwealth also previously briefed this issue before the Pennsylvania Supreme Court. Commonwealth's Pennsylvania Supreme Court Reply Brief at 17-18.

[30] In evaluating a challenge to factual findings of state courts this Court has often stated: "We . . . . customarily accept the factual findings of state courts in the absence of exceptional circumstances." *324 Liquor Corp. v.*

V. PROPERTY OWNERS' TAKINGS CLAIMS ARE NOT RIPE UNDER FEDERAL RIPENESS PRINCIPLES.

A. A Preenforcement Challenge To A Regulation Is Not Ripe As An "As Applied" Challenge And Federal Ripeness Principles Bar Such A Claim.

The nature of a preenforcement challenge to a regulation under Pennsylvania law is that the challenge is litigated before the regulation is applied and without exhausting administrative remedies. *Arsenal Coal Company v. Dept. of Envir. Res.*, 505 Pa. 198, 477 A.2d 1333 (1984). Property Owners' action is a preenforcement challenge to a regulation, and their decision to seek a preenforcement remedy under *Arsenal Coal* has a direct bearing on their ability to pursue an "as applied" regulatory takings challenge. In *Palazzolo* this Court held:

> A challenge to the application of a land use regulation, by contrast, does not mature until ripeness requirements have been satisfied, under principles we have discussed; *until this point an inverse condemnation claim alleging a regulatory taking cannot be maintained.*[31]

Duffy, 479 U.S. 351, 335, 107 S.Ct. 720, 729 (1987); *Cal Retail Liquor Dealers Ass'n. v. Midcal Aluminum Inc.*, 445 U.S. 97, 114, 100 S.Ct. 937, 946 (1980). The Court will not overturn the factual findings of a state court unless they are clearly erroneous absent exceptional circumstances. *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 1871 (1991) (plurality opinion). There are no exceptional circumstances in this case to justify a more searching review of the Trial Court's factual findings as Property Owners request.

[31] This Court reached this conclusion in the context of deciding that a post-enactment transfer of property is not an absolute bar to an as applied takings claim. The Supreme Court decided it was "illogical and unfair" to bar a challenge to a regulation by a subsequent owner where the prior owner's claim was never ripe.

Palazzolo, 533 U.S. at ___, 121 S.C. at 2463. (emphasis added). As a matter of federal constitutional law, a pre-enforcement challenge to a regulation under state law is not ripe as an applied challenge and cannot be maintained.

At the preliminary stages of litigation of this case, the Trial Court decided that Property Owners could pursue preenforcement review without exhausting administrative remedies. *Machipongo Land and Coal Co., Inc. v. Commonwealth*, 155 Pa. Cmwlth. 72, 624 A.2d 742 (1993) (*Machipongo I*) [32]. At the preliminary phase of this litigation, Property Owners were entitled to have their well pleaded assertions in their Complaint considered as true for the limited purposes of evaluating the Commonwealth's preliminary objections. *Bower v. Bower*, 531 Pa. 54, 57, 611 A.2d 181, 182 (1992). Property Owners presented no evidence at trial to support their allegations, and the Trial Court relied solely on the unsupported allegations in their Complaint and denied the Commonwealth the opportunity to offer evidence concerning the reach of the Goss Run UFM designation.

The Trial Court's approach is constitutionally flawed under *Palazzolo*. In *Palazzolo*, this Court recognized the distinction between state law ripeness or exhaustion principles and the federal ripeness rules governing regulatory takings. This Court stated: "The state court, however, did not rely upon state law ripeness or exhaustion principles in holding that petitioner's taking claim was barred by virtue of his failure to apply for a 74-lot subdivision; it relied on *Williamson County*." *Palazzolo*, 533 U.S. at ___, 121 S.Ct. at 2462, Citing *Williamson County Regional Planning Comm'n v.*

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[32] The Pennsylvania Supreme Court affirmed the Trial Court's decision on this point and allowed preenforcement review of the regulation to proceed to trial without the need to exhaust administrative remedies. *Machipongo Land and Coal Co., Inc. v. Commonwealth*, 544 Pa. 271, 676 A.2d 199 (1996) (*Machipongo III*).

Hamilton Bank of Johnson City, 473 U.S. 172, 105 S.Ct. 3108 (1985). In *Williamson County*, this Court stated:

> The question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is judicially reviewable.

Williamson County, 473 U.S. at 192, 105 S.Ct. at 3119. The Trial Court incorrectly assumed that its earlier decision to deny the Commonwealth's Preliminary Objections based on the state exhaustion of administration remedies ground addressed the federal *Williamson County* ripeness principles that this Court examined in *Palazzolo*.

B. The Commonwealth Has Never Had An Opportunity To Explain The Reach Of Its Regulation.

While the federal ripeness rules do not require the "submission of further and futile applications", it is clear under *Palazzolo* that a property owner has an obligation to submit an initial application or at least to give the agency a reasonable opportunity to explain and decide the reach of its challenged regulation. *Palazzolo*, 533 U.S. at ___, 121 S.Ct. at 2462. Under *Palazzolo*, the Commonwealth is entitled to an opportunity to explain the reach of its regulation.

In this case Property Owners never submitted any of the applications that are available under state law or Commonwealth policy and practice. Under state law and Commonwealth policy and practice, a UFM designation is neither permanent nor absolute. The record before this Court does not contain the necessary evidence concerning the nature and extent of restrictions imposed by the Goss Run UFM regulatory designation, and the Commonwealth was repeatedly denied the opportunity, using its own reasonable procedures, to decide and explain the reach of the challenged regulation. Property Owners' choice to file a preenforcement

challenge to the Goss Run UFM regulatory designation does not obviate the need to give the Commonwealth the opportunity to explain the reach of this regulation. Under *Palazzolo*, Property Owners' takings claims are not ripe as a matter of federal constitutional law until the Commonwealth has an opportunity to explain the reach of the regulation.

On remand to the Trial Court the Commonwealth will have an opportunity to explain the nature and extent of restrictions imposed on Property Owners' property by the Goss Run UFM regulatory designation.[33] This evidence is necessary to evaluate whether Property Owners' takings claims are ripe as a matter of federal constitutional law.

CONCLUSION

For the reasons set forth above the Commonwealth asks this Court to deny Property Owners' Petition for a Writ of Certiorari.

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[33] This evidence concerning the character of the government action is relevant under the *Penn Central* analysis that the Pennsylvania Supreme Court has ordered on remand. *Penn Central* 438 U.S. at 124, 98 S.Ct. at 2659.